STATE OF MICHIGAN

IN THE SUPREME COURT

MARK P. JAMES,

Plaintiff-Appellee,

and
AUTO-OWNERS INSURANCE COMPANY,

Intervening Plaintiff-Appellee,

v

AUTO LAB DIAGNOSTICS & TUNE UP CENTERS and
FARMERS INSURANCE EXCHANGE,

Defendants-Appellants,

and
SECOND INJURY FUND (PERMANENT & TOTAL
DISABILITY PROVISIONS),

Defendant-Appellee.
_____/

Supreme Court No. 128355

Court of Appeals No. 257993

Lower Court No. WCAC 04-000002

128355

SUPPLEMENTAL BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

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Camburn v Northwest School District (After Remand) **provides that injuries sustained while traveling to seminars are not covered by the Worker's Disability Compensation Act unless attendance was "compulsory or at least definitely urged or expected as opposed to merely encouraged" by the employer. Here, "all witnesses established that attendance was not compulsory; at best, attendance was encouraged." Should the Court therefore peremptorily reverse the decision below pursuant to *Camburn*?**

COUNTERSTATEMENT OF PROCEEDINGS AND FACTS

(Numbers in parentheses preceded by "I" refer to the pages of the transcript of the May 19, 2003 trial proceedings. Numbers preceded by "II" refer to the pages of the transcript of the June 6, 2003 trial proceedings. Numbers preceded by "III" refer to the pages of the transcript of the June 16, 2003 trial proceedings. Numbers preceded by "IV" refer to the pages of the transcript of the October 22, 2003 trial proceedings. Numbers preceded by "B" refer to the pages of the deposition of Brian Booher.)

The facts have been stated in the previous briefs. In sum, plaintiff was hired by defendant-Auto Lab Diagnostics & Tune Up Centers [defendant-Auto Lab] in August 2001 as an automobile technician (I 10; II 12). He worked on brakes, electrical problems, and beneath the car on mechanical problems (II 11).

Approximately two months after his hire, the majority owner of defendant-Auto Lab mentioned to plaintiff and another employee that there was a seminar they could attend if they wished related to the "OBD-II" system (I 18). This was a software system on a diagnostic scanner used to pinpoint engine problems (I 18-19). The majority owner said, "'I'm not forcing you to go, but if you want to go, you can go to it.'" (B 21). The majority owner explained at trial that he had first offered the seminar spots to his two lead technicians but they declined (II 7). The majority owner had credits with the seminar company and, wanting to exhaust the credit, offered the seminar spots to plaintiff and Mr. Booher, a co-employee (II 7; II 11). The majority owner indicated that he would not have benefited from plaintiff's attendance because plaintiff was not a diagnostic technician and would have not have performed such work even if he completed the seminar (II 11-12; II 28). There were no ramifications to plaintiff or Mr. Booher if they declined (II 9-11).

A different part owner of defendant-Auto Lab provided Mr. Booher with gas and food money to go to the seminar, after Mr. Booher told him just prior to departing that he had no money

(I 84-85). Plaintiff was not offered any money, food, or gas reimbursement as inducement to go to the seminar (I 47-48). Plaintiff testified that Mr. Booher would be doing the driving, would get paid mileage, and both he and Booher were told to keep receipts for reimbursement purposes (I 23).

The seminar took place over the course of two evenings in Grand Rapids, Michigan, four hours each night (I 21-22; I 87). It was approximately an hour and forty five minute drive from defendant-Auto Lab to the Grand Rapids seminar site (I 30).

Plaintiff and Booher worked most of the day on Wednesday, October 24, 2001 and left work approximately two hours early to go to the seminar (I 17; I 21-22). While Booher and plaintiff were driving there, they were involved in an automobile accident resulting in significant injuries to plaintiff, at approximately 5:30 p.m. (B 15; B 26; I 28; I 38). Booher's vehicle slid into a roadside sign (I 29). The pavement was wet because it was raining (*Id.*).

The employee and intervening plaintiff, Auto-Owners Insurance Company, who paid plaintiff automobile insurance benefits, pursued this workers' compensation action. Because plaintiff claimed *inter alia* total and permanent disability benefits under MCL 418.355, the instant defendant-Second Injury Fund (Permanent & Total Disability Provisions) [the Fund] was joined.[1] In a decision mailed on December 18, 2003, the workers' compensation trial Magistrate found that defendant-Auto Lab did not require plaintiff's attendance at the seminar yet granted plaintiff benefits, including total and permanent disability benefits. The Magistrate also assessed attorney fees on defendant-Auto Lab on weekly and medical benefits.

[1] In total and permanent disability cases, the Fund owes a layer of weekly benefits in addition to that paid by the employment.

All parties appealed to the Worker's Compensation Appellate Commission. In a decision dated August 20, 2004, the Commission affirmed the Magistrate's decision with a modification to delete attorney fees on weekly wage loss benefits.

Defendant-Auto Lab applied to the Court of Appeals for leave to appeal. The Court denied the application on February 22, 2005.

Defendant-Auto Lab sought leave to appeal from this Court. In its order entered October 14, 2005, the Court scheduled oral argument on whether to grant the application or take other peremptory action in accord with MCR 7.302(G)(1). In the same order, the Court allowed for supplemental briefing. This is the Fund's supplemental brief.

ARGUMENT

***Camburn v Northwest School District (After Remand)* provides that injuries sustained while traveling to seminars are not covered by the Worker's Disability Compensation Act unless attendance was "compulsory or at least definitely urged or expected as opposed to merely encouraged" by the employer. Here, "all witnesses established that attendance was not compulsory; at best, attendance was encouraged." The Court should therefore peremptorily reverse the decision below pursuant to *Camburn*.**

A. Standard of Review

Where the salient facts are not in dispute, a question of law in presented.[2] Here, there is no dispute the employer did not compel but, at most, encouraged the employee to go to the seminar in question. Given this, the Court should peremptorily reverse the order of the Worker's Compensation Appellate Commission because *Camburn v Northwest School District (After Remand)* requires that result.[3] Alternatively, the Court should grant leave to appeal to explore the statutory "arising out of and in the course of" employment requirements as they apply to travel to seminars.[4] The arguments offered by intervening plaintiff-Auto-Owners Insurance Company [Auto-Owners] and the employee fail to recognize *Camburn*'s "condition precedent" to recovery in seminar cases. Their views would reduce the condition precedent to but one of a number of factors to be considered contrary to *Camburn*.

B. The Rule On Injuries Traveling To Seminars As Articulated In *Camburn*

Camburn endorsed a particular template for resolving the question of whether injuries sustained while traveling to seminars are covered by the Worker's Disability Compensation Act. That template can be summarized as follows:

- (1) Was the employee within the scope of his employment at the time of the accident?

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[2] *Braxton v Chevrolet Grey Iron Foundry*, 396 Mich 685, 692-693; 242 NW2d 420 (1976); *Howard v City of Detroit*, 377 Mich 102, 105-106; 139 NW2d 677 (1976).
[3] *Camburn v Northwest School District (After Remand)*, 459 Mich 471; 592 NW2d 46 (1999).
[4] MCL 418.301(1).

This determination is made by answering two questions:

- (a) was the employer directly benefited by the employee's attendance?

  "and"

- (b) was attendance "compulsory or at least definitely urged or expected as opposed to merely encouraged?"

- (2) If the above "condition precedent" is satisfied, the next question is whether the employee was engaged in a "special mission" or fits within another similar exception to the general rule that injuries going to and coming from work are not compensable?

Camburn explained this progressive inquiry in its first footnote. Addressing the dissent's criticism of placing the "scope of employment" inquiry first, *Camburn*'s majority explained[5]:

> The concurring opinion faults the majority because by adopting the Court of Appeals opinion we deal with this case as turning on the scope of employment issue, in particular whether the event plaintiff was attending was within the scope of employment. Yet the reason we do so is because, unless plaintiff was within the scope of her employment, then she cannot be engaged in a special mission. Simply stated, a determination of the scope of employment issue is a condition precedent to a determination of the special mission exception. Because plaintiff's case falters on the scope of employment issue, there is no need to reach the mission exception.
>
> The concurring opinion also suggests that we granted leave to appeal in this case solely to consider the special mission exception. We disagree. First, our order granting leave to appeal did not so specify. Second, neither the magistrate, the WCAC, the Court of Appeals, nor the parties have treated the special mission exception as the exclusive issue in this case. Finally, it is simply more logical to first analyze the scope of employment issue because, as indicated previously, if the event plaintiff was attending was not in the scope of her employment, then there is no need to consider whether plaintiff was engaged in a special mission.

[5] *Camburn v Northwest School District (After Remand)*, 459 Mich at 473 n 1.

The *Camburn* majority then adopted the Court of Appeals' analysis and result, which had relied upon *Marcotte v Tamarack City Volunteer Fire Department.*[6] *Camburn* says in this regard[7]:

> The WCAC held that the magistrate properly based her analysis on [the Court of Appeals] opinion in *Marcotte v Tamarack City Volunteer Fire Dep't*, 120 Mich App 671; 327 NW2d 325 (1982), which quoted with approval from Professor Larson's treatise on worker's compensation law and, at 678, summarized the rule as follows:
>
> > The general rule set forth in Larson's treatise and applied by the WCAB [Worker's Compensation Appeal Board] consists of a two-part test: (1) was the employer directly benefited by the employee's attendance; *and* (2) was attendance compulsory or at least definitely urged or expected as opposed to merely encouraged? This rule appears to be consistent with Michigan law. [1994 Mich ACO 2378.]

The word "and" means both elements must be satisfied not just one. Only if this first step is met does the inquiry proceed to determine whether the case fits within a recognized exception to the "going to and coming from" general rule disfavoring compensability.[8]

Here, the workers' compensation trial Magistrate specifically found as fact the employee did not meet one of the two criterion to satisfy the "condition precedent."[9] It was not a close question. The trial Magistrate said: "The testimony of all witnesses established that attendance was not compulsory; at best, attendance was encouraged." (Magistrate's decision, p 3). This factual finding was unaltered by the Worker's Compensation Appellate Commission on appeal. Neither the employee nor Auto-Owners challenge this factfinding on appeal.

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[6] *Marcotte v Tamarack City Volunteer Fire Department*, 120 Mich App 671; 327 NW2d 325 (1982).
[7] *Camburn v Northwest School District (After Remand)*, 459 Mich at 475 (italics added).
[8] *Camburn v Northwest School District (After Remand)*, 459 Mich at 476-477.
[9] *Camburn v Northwest School District (After Remand)*, 459 Mich at 473 n 1.

Therefore, under *Camburn*, there can be no recovery because attendance at the seminar to which the employee was enroute when injured was not compulsory, was not definitely urged or expected, but rather "at best" encouraged. Inasmuch as one of the two elements necessary for satisfaction of the "condition precedent" has not been met, the inquiry stops. "[T]here is no need to reach" any other question.[10]

C. Plaintiffs' Arguments Eliminate The Condition Precedent And Would Reduce The Compulsion Inquiry To A Mere Factor In A Grab Bag Of Factors

Since Auto-Owners and the employee accepted as final the trial Magistrate's factfinding on compulsion, they must argue the lack of compulsion is not fatal. To accept their argument is to contradict *Camburn* and remove compulsion as a requirement. To accept their argument is to reduce compulsion to one of a myriad of factors under a holistic approach toward determining compensability. The Court should reject the invitation and maintain what *Camburn* says.

Auto-Owners argues the compulsion portion of *Camburn* is: "dicta;" "contains no critical analysis whatsoever;" and, is "contradicted by the broader discussion within *Camburn* itself' that blends the elements "*together* to reach a *single* conclusion on whether the requisite 'employment connection' is established." (Auto-Owners' answer, pp 11-12; emphasis in original).[11]

In response, the Fund says, first, *Camburn*'s discussion of compulsion is not *dicta*. *Camburn* describes compulsion as part of a "condition precedent" requirement that, if not satisfied, means "there is no need to consider" anything further.[12] If anything is *dicta*, *Camburn*'s discussion of that employee's "alternative analysis" is. *Camburn* says in that respect: "even if plaintiff's

[10] *Camburn v Northwest School District (After Remand)*, 459 Mich at 473 n 1.
[11] The employee's argument incorporated by reference Auto-Owners' argument in this respect. (Plaintiff's answer, p 13).
[12] *Camburn v Northwest School District (After Remand)*, 459 Mich at 473 n 1.

attendance at the seminar had been an incident of employment, her injury on the way to the seminar would not be compensable" with reference to the second part of the test.[13]

Second, *Camburn* does contain "critical analysis." The fact that this Court "adopt[ed] as our own the following opinion of the Court of Appeals" in *Camburn* means this Court agreed with the analysis and saw no reason to offer improvement on it.[14] The fact the Court was not "critical" does not mean the Court was noncommittal or ambivalent in its resolution of the case. The Court was simply in complete agreement with the Court of Appeals' analysis.

Third and most important, the Court should reject the plaintiffs' attempt to reduce the compulsion to but one factor in a multi-factor test. Abandonment of the compulsion "condition precedent" is to embrace a multi-faceted inquiry into whether the factfinder feels "the requisite 'employment connection' is established." (Auto-Owners' answer, p 12). This would create an indefinite rule and invite unprincipled and unpredictable *ad hoc* decisionmaking. What was once a "condition precedent" to recovery would be merely a factor amongst many. Its absence would no longer be fatal to the claim. Recovery could follow because if the factfinder in every case is permitted to pick amongst a basket of factors and "weigh[] [them] together to reach a single conclusion," then any result might be labeled "employment connected" or a "circumstance of employment."

Michigan's history in this area teaches against a drift away from the essential statutory compensation coverage formula into rules such as: can the injury be deemed "'a circumstance of his employment,'" can the activity be deemed "reasonably incidental to the employment

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[13] *Camburn v Northwest School District (After Remand)*, 459 Mich at 479.
[14] *Camburn v Northwest School District (After Remand)*, 459 Mich at 473.

relationship," did the injury arise out of the employment "ambience,"[15] or could it be said the injury relates to the "zones, environments and hazards" of work.[16] Justice Ryan, in *McClure v General Motors Corp (On Rehearing)*, eloquently argued against this judicial drift.[17] *McClure* and its companion case, *Krolczyk*,[18] were automobile accident injuries sustained off the employer's premises during a lunch break. Speaking for the plurality of the Court on rehearing, Justice Ryan said[19]:

> Following the earlier *McClure* opinion, three of our brothers, with citation to *Howard v Detroit,* 377 Mich 102; 139 NW2d 677 (1966), begin with the finding of fact that it was a "circumstance" of plaintiffs' respective employments that they "were where they were when the injuries befell them". From that premise it is further concluded that lunchtime activities are also a "circumstance" of one's employment and "incidental to the employment", and that *a fortiori* injuries suffered during those activities are compensable as arising out of and in the course of that employment, regardless of whether the injury occurs on or off the premises where the work is to be done.[3]
>
> We cannot subscribe to that combination of appellate fact-finding and reasoning.
>
> Our brothers, writing for reversal of the Worker's Compensation Appeal Board decision and reaffirmance of *McClure* I, would add this case to a line of recent decisions in which this Court has expanded and broadened the sweep of workers' compensation coverage by judicial decision.[4]
>
> To follow that course here would see this Court effect more worker compensation law "reform" of its own, unchecked by burdensome legislative committee hearings, union and management testimonial expertise, cost analyses, consideration of the effect upon related

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[15] *Thomas v Certified Refrigeration, Inc*, 392 Mich 623, 632, 636, and 637, respectively; 221 NW2d 378 (1974) (footnote omitted).
[16] *Lasiewicki v Tusco Products Co*, 372 Mich 125; 125 NW2d 479 (1963).
[17] *McClure v General Motors Corp (On Rehearing)*, 408 Mich 191; 289 NW2d 631 (1980).
[18] *Krolczyk v Wolverine Moving & Storage Company*, 408 Mich 191; 289 NW2d 631 (1980).
[19] *McClure v General Motors Corp (On Rehearing)*, 408 Mich 191, 203-207; 289 NW2d 631 (1980) (opinion of RYAN, J.) (emphasis in original).

social legislation and the risk of rejection following bicameral debate or of executive veto.

We decline to continue the ongoing dilution of the legislative requirement that, as a condition of compensability, an employee's injury must be suffered "out of and in the course of his employment" by first equating "circumstance of employment" with "out of and in the course of employment", and finally substituting the newly created judicial standard for the longstanding legislative norm. We cannot agree with our colleagues that:

> "The significant inquiry in the instant cases is not whether the employees were injured while carrying out duties absolutely required by their employment contracts, but whether the injuries occurred as a circumstance of the employment relationship."

We are of the view, of course, that neither of the stated alternatives is the "significant inquiry"; that the significant inquiry is whether the injuries arose "out of and in the course of his employment".

By this case, the Court is asked to extend the scope of workers' compensation coverage in three inter-related ways:

1. To that *time segment* of the worker's day historically and intentionally allocated to the employee for an interruption of and withdrawal from the service of the employer, traditionally understood to be mealtime,

2. To *any activity* whether performed "out of and in the course of his employment", or not, in which the employee may be engaged during that period, and

3. To *any place* in which the employee may be during that period.

* * *

It may indeed have been a "circumstance" of Mr. McClure's employment that he was in the middle of Fort Street, and of Ms. Krolczyk's that she was driving a car a half-mile away from work during the lunch period, but the Legislature has not seen fit to provide compensation for injuries suffered by workers during off-premises lunch-hour activity of a purely personal character. Perhaps it ought to have done so long ago–but it has not, and we are not constitutionally free to do so in its place. Like it or not, the test for

entitlement to compensation benefits remains "out of and in the course of" employment.

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[3] As is indicated in his separate opinion for affirmance on other grounds, Justice LEVIN is no longer of that view, at least with respect to the facts of these cases.

[4] [The Court's lengthy catalogue of cases illustrating the expansion of coverage via judicial decision is omitted here.]

An equally articulate opinion both describing and then rejecting the same judicial tendency is *Tedford v Stouffer's Northland Inn.*[20] *Tedford* involved a slip and fall injury in a parking lot between the employer's premises and a public bus stop. Arguing against case law erosion of the statute's term "premises," *Tedford* said[21]:

> [W]e are convinced that the manner in which plaintiff seeks to extend coverage should be avoided by this Court.
>
> Plaintiff ignores the fact that the premises rule is in the nature of a limitation. Undoubtedly, "[a] line must be drawn at some point". *McClure v General Motors Corp (On Rehearing)*, 408 Mich 191, 226; 289 NW2d 631 (1980) (LEVIN, J., concurring). To the extent we bootstrap successive factual situations onto one another under the guise of liberally interpreting the compensation statute, we avoid such line drawing to the detriment of the sound and efficient administration of the compensation apparatus. Indeed, the *Fischer* decision has been criticized for that very reason.
>
> "The *Dinardo* (New Jersey) and *Fischer* (Michigan) cases supply classical examples of the phenomenon * * * of making law by measuring only the distance to the last precedent while completely losing sight of the essential principle involved in the rule. Here we see the first step in the direction of the erosion of the premises rule by this treacherous technique of selecting some past expansion and then exclaiming over how unfair it is to draw a distinction between two situations that seem so much alike. Have the intermediate New Jersey and Michigan courts really thought through where this process will end?" ... 1 Larson, Workmen's Compensation Law, § 15.12, pp 4-8–4-10.

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[20] *Tedford v Stouffer's Northland Inn*, 106 Mich App 493; 308 NW2d 254 (1981).

[21] *Tedford v Stouffer's Northland Inn*, 106 Mich App at 500-501, 502, 503, respectively.

> The implicit trend in this matter of decisionmaking is a steady dilution of the legislative limitations on compensation. The Supreme Court has specifically disapproved of such judicial "reform" of the compensation act. *McClure*, *supra*, 204. While the statutory coming-and-going rule does not directly limit coverage to on-premises injuries, *id.*, 222-223 (LEVIN, J., concurring), it must be remembered that the rule is an exception to the basic requirement that compensable injuries arise out of and in the course of employment.
>
> ***
>
> We are not convinced that off-premises injuries should be compensated merely because the employee is in the process of arriving at the workplace by travelling his or her usual, customary and direct route. We do not believe that the "zones, environments and hazards" test of *Hills* and *Lasiewicki* was originally intended to permit such a result. In the present situation, defendant had no control over or responsibility for the route taken by plaintiff or the condition of the parking lot in question. There is no logical justification for expanding the premises concept to this situation.
>
> We are not unaware of the long-standing policy that the compensation statute be interpreted in a liberal and humanitarian manner. See *e.g.*, *Jolliff v American Advertising Distributors, Inc*, 49 Mich App 1; 211 NW2d 260 (1973), *lv den* 391 Mich 780 (1974). However, that policy does not call for a construction that is judicially and administratively unmanageable or which calls for compensation far beyond that envisioned by the Legislature.

Finally, Auto-Owners and the employee also argue that the Worker's Compensation Appellate Commission or Magistrate can heavily weigh one factor and completely overlook the absence of another, given *Reiniche v Wal-Mart Stores, Inc.*[22]

Reiniche, however, crucially differentiated its fact pattern from *Camburn*. That differentiation makes all the difference. *Reiniche* was not a seminar case. It was a case where the employee volunteered, at the employer's encouragement, to build a float for the company and

[22] *Reiniche v Wal-Mart Stores, Inc*, 2001 ACO #64.

participate in a parade on the float. The plaintiff fell off a trailer being used for the parade float and injured herself. While the trial Magistrate relied on *Camburn*'s analysis of seminar cases and the mere encouragement (no compulsion) by the employer to deny benefits, the Commission disagreed *Camburn* applied for the following reason[23]:

> The critical difference between this case and *Camburn* concerns this nature of activity. In *Camburn*, plaintiff went to a seminar to enhance her education and professional abilities. Here, the way we see the facts as found by the magistrate, plaintiff was engaged in an actual business activity of the employer. The float that plaintiff was on was in essence a moving advertisement for Wal-Mart, and hence, a part of the business activities of Wal-Mart. Plaintiff was not just involved in tangential activity of some benefit to the employer; she was involved in the activity *of* the employer. This is not a mere case of benefit to the employer, but of an employee actually performing work on behalf of the employer.

The instant employee also "went to a seminar to enhance h[is] education and professional abilities." Unlike *Reiniche*, this employee here was not "involved in the activity *of* the employer ... [he was not] actually performing work on behalf of the employer" when injured. Thus, *Reiniche* has no application to this seminar case.

Plaintiffs also offer an example where an employer directly benefits from a seminar but does not compel – only encourages – attendance. The Fund says in response, first, if employers directly benefit, they are likely to compel attendance. If the employer might directly benefit but does not compel attendance, then there is nothing improper in denying benefits for insufficient work relationship. For example, if a bank directly benefits from an employee attending a financial planning seminar but does not compel attendance, then the employee is free to attend or not. If the employee elects to attend, his travel there is entirely his own concern. Such cases present the classic

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[23] *Reiniche v Wal-Mart Stores, Inc*, 2001 ACO #64; 2001 Mich WCACO 263 at 266 (emphasis in original).

situation of an employee attending a seminar to enhance his or her personal skills or marketability more than anything else. *Camburn* was such a case, *i.e.*, personal professional enhancement with no compulsion. Plaintiffs' argument in this respect illustrates their desire to alter *Camburn*.

The Court should summarily reverse the decisions below on the strength of *Camburn*. Alternatively, the Court should grant leave to fully explore the "arising out of and in the course of employment" coverage formula as it applies to injuries sustained while traveling to seminars.[24]

[24] MCL 418.301(1).

RELIEF SOUGHT

WHEREFORE, defendant-appellee, Second Injury Fund (Permanent & Total Disability Provisions), respectfully requests the Supreme Court reverse the decisions below or, alternatively, grant leave to appeal.

Respectfully submitted,

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